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NO. 03-710

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK, A WASHINGTON STATE PATROL OFFICER, JOI HANER, A WASHINGTON STATE PATROL OFFICER, AND THEIR MARITAL COMMUNITIES,
Petitioners,

v.

JEROME ANTHONY ALFORD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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A. The "Closely Related Offense Doctrine" Is Not Grounded In Fourth Amendment Jurisprudence Or Sound Social Policy

"[T]he totality of the circumstances analysis traditionally . . . has informed probable cause determinations". *Illinois v. Gates*, 462 U.S. 213, 238 (1983). It is an objective inquiry asking whether "at the moment of arrest" the facts and circumstances within the knowledge of the officer would warrant a reasonable officer to believe that the suspect had committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Respondent Alford seeks to undercut the objective nature of the probable cause inquiry and significantly restrict its scope through the "closely related offense doctrine". Alford and his amicus curiae, the National Association of Criminal Defense Lawyers (NACDL), variably describe the doctrine as the offense articulated by the officer at arrest; the same conduct; or what NACDL dubs "the true grounds" for arrest. Resp't Br. at 7; NACDL Br. at 2.[1] Application of the doctrine would limit the facts and circumstances that may be considered in determining whether an arrest was reasonable. Thus, probable cause would be defined far more narrowly than under the Court's longstanding analytical framework. Nothing in the Court's Fourth Amendment jurisprudence or sound public policy supports such a drastic change in course.

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[1] Alford's and NACDL's different articulations of the "closely related offense doctrine" only reinforce the unrefuted point made by the United States that the "closely related offense doctrine" is neither uniform in its scope nor consistent in its consequences. U.S. Br. at 16-19.

1. The "Closely Related Offense Doctrine" Injects Subjective Judgments Into The Probable Cause Determination

All parties and amici curiae in this case agree—as they must—that probable cause under the Fourth Amendment is an objective inquiry asking whether, at the moment of arrest, the facts and circumstances within the knowledge of the officer would warrant a reasonable officer to believe that the suspect had committed or was committing an offense. *Beck*, 379 U.S. at 91. Alford and NACDL make two arguments to shoehorn the "closely related offense doctrine" into this objective standard.

First, Alford and NACDL argue that the "closely related offense doctrine" is, in fact, an objective standard. They characterize the officer's articulation of an offense—or where none is articulated, "the true grounds" for arrest—as objective. Resp't Br. at 8-9; NACDL Br. at 2, 14-15. But this characterization fails. When officers articulate an offense in connection with arrest, their statement represents the officers' subjective legal evaluation of the facts and circumstances known at the time of arrest. The officers' articulation is nothing more than the subjective exercise of on-scene discretion. The officers' subjective belief that there is or is not probable cause to arrest for a specific offense may be wrong. The officers may have a subjective belief that there is probable cause to arrest for a number of offenses, but may choose to articulate what they believe is the most serious. Each of these possibilities is based on the subjective judgment of the arresting officers.

In arguing that an articulated offense is objective, Alford and NACDL confuse the exercise of proving what the officers articulated at arrest, with the thought process of the officers that led to the articulation. That one may objectively prove what the officers said at the time of the arrest does not make the articulation itself objective. It is subjective—based on the officers' best judgment of the facts and circumstances known at the time of arrest.

The facts of this case provide a striking example of the subjective nature of the offense articulated at arrest. Imagine that a second motorist engaged in precisely the same conduct as Alford, but was stopped by a different officer. Unlike the petitioners, that officer decided to arrest the second motorist for impersonating an officer, instead of a violation of the Privacy Act. Although the objective facts and circumstances at the time of arrest are precisely the same in both cases, the result would be different under Alford's theory. Under the "closely related offense doctrine", the arrest of the second motorist would be valid; Alford's arrest would be invalid. The only difference in the two situations is the subjective judgment of the officers involved—judgment that the "closely related offense doctrine" makes determinative of probable cause.

NACDL's second argument is that the Court's rejection of the subjective standard only encompasses the motivation of the officers for making the arrest. NACDL Br. at 4-7. NACDL relies on *Whren v. United States*, 517 U.S. 806 (1996), to support this claim. It is true that *Whren* involved a claim that the traffic stop at issue was a mere pretext to search

for drugs. However, nothing in *Whren* limits the Court's rejection of the subjective standard to claims that the arresting officer's motive was improper. Indeed, the Court emphasized that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent". *Whren*, 517 U.S. at 814. *Whren* supported this statement with examples that did not involve the officer's motivation for making the arrest. *Id.* ("See, *e.g.*, *Robinson*, *supra*, at 236, 94 S. Ct., at 477 ('Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that the officer did not indicate any subjective fear of the arrestee or that he did not himself suspect that the arrestee was armed') (footnotes omitted)"). The Court's objective reasonableness standard precludes all subjective evaluation of the arrest—not just the officer's subjective motive for making the arrest.

As demonstrated in petitioners' opening brief, and further discussed below, a subjective inquiry is inconsistent with the probable cause determination established by the Court, but it is integral to the "closely related offense doctrine".

2. The "Closely Related Offense Doctrine" Does Not Work And Leads To Irrational Results

The "closely related offense doctrine" depends upon officers articulating the basis of the arrest. Without this articulation, there is no way to determine whether the articulated offense is closely related to another offense. Yet there is no constitutional requirement that an officer articulate

the basis for an arrest at the time of arrest. And in some circumstances, it is not practical or possible to articulate the basis for arrest.

Although it is doubtless good practice to explain to suspects why they are being arrested, the Fourth Amendment does not require it.[2] *Kladis v. Brezek*, 823 F.2d 1014, 1018 (7th Cir. 1987) ("We conclude that . . . the Fourth Amendment [does not] provide [the defendant] the right to be informed of the reason for his arrest . . . [T]he Fourth Amendment requires only that the police have probable cause to believe that an individual has broken the law before arresting him or her."); *Williams v. Scharlo*, 93 F.3d 527, 529 (8th Cir. 1996).[3] Rather than requiring an officer to explain to suspects why they are being arrested, the Fourth Amendment requires that states "must provide a fair

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[2] Alford argues that officers are required to articulate the basis of arrest. Resp't Br. at 22-24. All of the decisions cited by Alford involve statutes or court rules that impose a requirement to inform a suspect of the grounds for arrest. However, none of the decisions hold that the Fourth Amendment requires an officer to articulate the basis for arrest.

[3] The Sixth Amendment of the United States Constitution does provide that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation". The Sixth Amendment's rights to counsel attaches "only at or after the initiation of adversary judicial proceedings against the defendant". *United States v. Gouveia*, 467 U.S. 180, 187 (1984). Likewise, the right to be informed of the nature and cause of the accusation "does not come into play until the government has committed itself to prosecution". *Kladis*, 823 F.2d at 1018. *Burchett v. Kiefer*, 310 F.3d 937, 947 (6th Cir. 2002).

and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or *promptly* after arrest". *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991).

In addition, there are situations when, as a practical matter, officers cannot articulate the basis for an arrest because they do not believe that an arrest has taken place. For example, in *Florida v. Royer*, 460 U.S. 491 (1983), officers suspected the defendant was transporting narcotics. The officers thought detaining the defendant was permissible under *Terry v. Ohio*, 392 U.S. 1 (1968). However, a plurality of the Court concluded that what began as a *Terry* stop, became an arrest. *Royer*, 460 U.S. at 502 ("the detention to which [the defendant] was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity"). Thus, as "a practical matter, [the defendant] was under arrest". *Id.* at 503. The officers did not articulate the basis for the arrest, because they did not realize the defendant had been arrested. Despite this fact, the plurality concluded "the fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause and hence removing any barrier to relying on Royer's consent to search". *Id.* at 507.

Another situation where officers likely will not articulate the basis for probable cause is when an officer disables a fleeing suspect. For example, in *Tennessee v. Garner*, 471 U.S. 1 (1985), an officer

shot and killed a fleeing suspect. The Court held that "the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment". *Garner*, 471 U.S. at 7. But when the officer shot the fleeing suspect, he did not articulate the basis for probable cause necessary to meet the reasonableness requirement of the Fourth Amendment. In both *Royer* and *Garner*, the Court ultimately held that there was no probable cause for the arrest or the shooting. In both cases, the Court looked at the facts and circumstances known to the officers at the time. The Court did not limit its review because the officers did not articulate the basis of the seizure.

The "closely related offense doctrine" simply does not work in these circumstances.[4] That is because the doctrine first requires one to ascertain the offense for which probable cause was lacking and then ask whether the same conduct provides probable cause for arrest on a "closely related offense". When no offense is articulated at arrest, no touchstone exists for answering this question. The

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[4] Application of the "closely related offense doctrine" will also likely lead to two outcomes—neither of which is desirable. On one hand, officers may simply choose not to inform a suspect of the grounds for arrest, thus avoiding the limitation that it would impose on the facts and circumstances supporting probable cause. On the other hand, officers will err on the side of charging every offense they believe might arise from the facts and circumstances. *United States v. Bookhardt*, 277 F.3d 558, 566 (D.C. Cir. 2002) (limiting probable cause inquiry to articulated offense "would do no more than create an incentive" to routinely charge every offense). This stacking of charges has adverse consequences for the defendant. *See* Pet'r Br. at 24 n.5.

doctrine simply does not work and, as in *Royer* and *Garner*, the measure of probable cause is the totality of facts and circumstances known to the officer at the time of arrest, the objective reasonableness test. Even if the premise of the "closely related offense doctrine" is sound, and petitioners submit that it is not, it makes no sense to allow later extrapolated justification for arrest simply because no offense was articulated at arrest. But that is the result of the doctrine.

3. The "Closely Related Offense Doctrine" Is Contrary To The Decisions Of This Court

As posited by Alford and NACDL, the objective reasonableness of an intrusion on individual security is judged based on the officer's subjective decisions about whether an individual has committed an offense, except when they demonstrate pretext for an otherwise valid arrest. This is far different from the test formulated by the Court and is contrary to its jurisprudence.

Under the decisions of this Court, the objective reasonableness test broadly excludes the subjective beliefs of law enforcement officers in evaluating probable cause. For example, in *Sibron v. New York*, 392 U.S. 40, 63-65 (1968), the Court determined that, based on the facts and circumstances leading to Sibron's arrest, the arresting officer lacked probable cause for arrest and, thus, lacked authority to search Sibron incident to arrest. The Court did not end its inquiry at that point, however, as Alford's theory and the "closely related offense doctrine" would dictate. Instead, the Court examined whether "[the

patrolman's] seizure and search of Sibron might still have been justified at the outset if he had reasonable grounds to believe that Sibron was armed and dangerous". *Id.* at 63. Although the Court ultimately rejected this alternative basis for justifying the search, the Court plainly did not confine its inquiry to the facts and circumstances establishing an articulated offense, or in NACDL's words, the "true grounds" for the intrusion. *United States v. Robinson*, 414 U.S. 218, 227 (1973), also demonstrates that in determining the permissibility of an intrusion under the Fourth Amendment, a reviewing court is not limited to looking at the facts and circumstances the officer used to justify the intrusion. Robinson was arrested for driving while his operator's permit was revoked. The arresting officer searched Robinson incident to arrest and discovered heroin. Robinson challenged his conviction for possession of heroin, arguing that the facts and circumstances giving rise to his arrest justified only a frisk for weapons. The Court declined to accept Robinson's proposed "novel and far-reaching limitation". *Robinson*, 414 U.S. at 229. Looking more broadly, the Court held that other considerations justified the search. *Id.*

Further, none of the decisions of this Court relied on by NACDL support the notion that the officer's subjective articulation of an offense at arrest, or the "true grounds" for arrest, limit the examination of probable cause. For example, NACDL's snippet from *Stacey v. Emery*, 97 U.S. 642, 645 (1878), "that the party is guilty *of the offense with which he is charged*" (emphasis added by NACDL), says nothing for this case, as the scope of

the probable cause inquiry was not there in question. NACDL Br. at 7. NACDL also relies on statements from *Terry* requiring justification of "the particular intrusion" as though "the particular intrusion" refers to the articulated offense or the officer's subjective reason for the action taken. NACDL Br. at 7-8. It does not. In context, the reference is to the justification required for the particular *type* of intrusion—justification that varies based on whether the intrusion is a stop, a frisk, an arrest, or a search. Indeed, *Terry* reiterates that the "central inquiry under the Fourth Amendment [is] the reasonableness in all of the circumstances of the . . . governmental invasion of a citizen's personal security". *Terry*, 392 U.S. at 19. Nor when considered in context, does NACDL's quote from *United States v. Brignoni-Ponce*, 422 U.S. 873, 886, n.11 (1975) (NACDL Br. at 9), support the notion that the articulated offense or "true grounds" for the arrest limits the scope of relevant facts and circumstances that may be considered in examining probable cause. In *Brignoni-Ponce*, the Court rejected the government's effort to import a new justification for an otherwise unlawful stop "at this stage of the case" on the basis that it had neither been raised in the trial court nor in the court of appeals. *Id.*

Alford additionally quotes from *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968), to argue that facts relating to an offense that is not articulated at arrest are unavailable to demonstrate probable cause. Resp't Br. at 12-13. But the quote is a dissent from an order dismissing the writ of certiorari as improvidently granted. Concurring in

the dismissal, Justices Fortas and Marshall explain that the writ was dismissed precisely because the record was inadequate for the Court to consider whether probable cause existed based on an uncharged offense. *Wainwright*, 392 U.S. at 598-99.

NACDL also asserts that "fundamental Fourth Amendment principles prohibit[] police officers from intruding on . . . personal liberty unless the . . . officer has [a] basis for believing that the private citizen has committed a particular offense". NACDL Br. at 2. As discussed above, at pages 9-10, neither *Terry* nor *Stacey*, the cases cited by NACDL to support this "fundamental" proposition, actually do so. Alford himself asserts the same principle, citing an explicit requirement in the 1776 Virginia Declaration of Rights—a requirement that is not contained in the Fourth Amendment and that speaks only to warrant requirements in any event. Resp't Br. at 16.

The Court's jurisprudence, on the other hand, strongly indicates that probable cause to arrest does not rise and fall with the existence of a specific offense. *See, e.g., Michigan v. DePhillippo*, 443 U.S. 31 (1979) (probable cause to arrest not vitiated where ordinance establishing offense subsequently was held unconstitutional); *Hill v. California*, 401 U.S. 797 (1971) (probable cause to arrest still existed where the wrong person was reasonably arrested). This view also comports with the more general recognition that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment" (*id.* at 804) and is a function of "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal

technicians, act". *Id.* at 404-05 (citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

4. The "Closely Related Offense Doctrine" Is Inconsistent With The Public Policy Values Of The Fourth Amendment

The reasonableness requirement of the Fourth Amendment is a question of the "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers". *Brignoni-Ponce*, 422 U.S. at 878. Limiting the facts and circumstances known to the officer at the time of arrest to closely related offenses does not serve this balance. The physical intrusion on individual security occasioned by arrest is precisely the same whether or not the arresting officer ties the arrest to a specific offense. And whether an offense is articulated at arrest, the individual arrested is entitled to a prompt post-arrest judicial determination of probable cause, a determination certain to illuminate the offenses that may be charged. *Gerstein v. Pugh*, 420 U.S. 103 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). On the other hand, the public interest in detaining an individual who is reasonably believed to have engaged in conduct providing basis for arrest is substantial, regardless of the specific offense articulated by the arresting officer.[5]

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[5] Alford's argument tacitly seems to suggest that where probable cause for arrest exists only for an offense unrelated to the one articulated by the officer, no arrest would be made. Such a suggestion is groundless as a general matter and certainly is groundless in this case. Petitioners initially stopped Alford based on concerns that he was impersonating an officer, an unarticulated offense supported by probable cause. JA at 97, 101.

Alford argues broadly that the "closely related offense doctrine" serves the values of the Fourth Amendment by limiting ex post facto justifications for arrest. Resp't Br. at 5-14, 19-22. But under the doctrine, an arrest—supported by an ex post facto justification—is permissible, if the offense is closely related. Alford does not explain why an ex post facto justification is permissible when the offense is closely related but impermissible when it is not.[6] More puzzling, the rule treats justification that actually motivated the police to act as an ex post facto justification. This case is a perfect example. Impersonating an officer is not closely related to violation of the Privacy Act. Yet there can be no question that probable cause to arrest Alford for impersonating an officer was not an ex post facto justification. Trooper Haner stopped Alford in the first place because he suspected Alford was impersonating a police officer. Pet'r Br. at 3-4. Trooper Haner had no knowledge that Alford had a tape recorder or that Alford would record his conversation with petitioners.[7]

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[6] Indeed, *Kies v. City of Aurora*, 156 F. Supp. 2d 970 (N.D. Ill. 2001), which Alford criticizes as an example of the "perils of the 'anything goes' approach", actually involved the application of the closely related offense doctrine. Resp't Br. at 20. *Kies*, 156 F. Supp. 2d at 984 ("An arrest without probable cause does not violate the arrestee's rights so long as probable cause existed on a closely-related charge.").

[7] Alford also argues that the "closely related offense doctrine" is necessary to prevent racial profiling. Resp't Br. at 21-22. But this Court has held that it is the Equal Protection

Alford and NACDL also question whether the "closely related offense doctrine" substantially diminishes prosecutorial charging discretion. Resp't Br. at 13; NACDL Br. at 20. However, they ignore the fact that the application of the doctrine removes from the prosecutor's consideration other crimes established as the result of the arrest, including criminal activity uncovered by search incident to arrest. *Wong Sun v. United States*, 371 U.S. 471, 484-87 (1963).[8]

At bottom, Alford fails to demonstrate any basis in the Fourth Amendment or sound social policy for the substantial limitation that the "closely related offense doctrine" imposes on probable cause.

Clause, not the Fourth Amendment, that protects citizens from intentionally discriminatory application of the laws. *Whren*, 517 U.S. at 813 ("But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

[8] Alford's argument that the common law right to resist arrest justifies that the "closely related offense doctrine" is misguided. Resp't Br. at 25. First, it assumes the very question presented, proceeding from the premise that an arrest justified by probable cause nonetheless is an unlawful arrest if probable cause does not exist for the offense articulated at arrest. Further, as Alford recognizes, the common law right to resist arrest has been substantially limited. Indeed, even if the arrest in this case had been invalid, Alford had no right to resist. *Washington v. Valentine*, 935 P.2d 1294, 1304 (Wash. 1997) (arrestee has no right to use force against arresting officers where unlawful arrest threatens only loss of freedom).

B. Petitioners Are Entitled To Qualified Immunity Because The "Closely Related Offense Doctrine" Was Not Clearly Established Law[9]

1. Whether The "Closely Related Offense Doctrine" Was Clearly Established Is Properly Before The Court

NACDL contends that whether the "closely related offense doctrine" was clearly established law is not presented, because it was not raised below. NACDL is wrong. Jury Instruction 12 (Pet. at 63a) allowed the jury to find that probable cause existed, "if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit *a crime*". (Emphasis added.) The instruction did not limit the jury to finding probable cause based only on crimes related to the Privacy Act. Alford did not object to this instruction, and Deputy Prosecutor Lindquist testified that probable cause existed for the offenses of obstructing and impersonating an officer. JA at 179-80. In effect then, the "closely related offense doctrine" was "dead letter" in the district court. The trial proceeded and the verdict was rendered based on the objective reasonableness test for probable cause.

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[9] If the Court concurs with petitioners that the Fourth Amendment is not violated simply because an officer articulates a crime for which probable cause is lacking when probable cause exists for any other crime, then it need not reach the question of qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Alford did not assign error on appeal to Jury Instruction 12 and did not argue the "closely related offense doctrine" at all in his briefing before the Ninth Circuit. Whether the "closely related offense doctrine" applied was raised *sua sponte* by the Ninth Circuit panel shortly before oral argument, when the Court directed "counsel should be prepared to discuss the effect, if any, on this appeal of *Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994)". Pet. at 24a.

In advancing the objective reasonableness test in connection with their claim for qualified immunity, petitioners included in their Brief Of Appellees case law contrary to the "closely related offense doctrine", specifically *United States v. Saunders*, 476 F.2d 5 (5th Cir. 1973), and *Washington v. Huff*, 826 P.2d 698, 701 (Wash. Ct. App.), *review denied*, 119 Wash. 2d 1007 (Wash. 1992) (under the federal constitution "an arrest supported by probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists"). Based on the "closely related offense doctrine", the Ninth Circuit rejected petitioners' qualified immunity claim and reversed the jury's verdict in favor of petitioners. Pet. at 12a-13a.[10] In doing so, the Ninth Circuit acknowledged that *Saunders* was contrary to the "closely related offense doctrine" but dismissed it as being the law of another Circuit and "not the test

[10] The Ninth Circuit's reversal ignored the fact that, based on objective evidence, the jury implicitly found probable cause to arrest Mr. Alford. *See* Jury Instruction 12, Pet. at 63a.

applied in the Ninth Circuit". The court below did not even acknowledge that under *Huff*, the "closely related offense doctrine" is contrary to the law in Washington that an arrest is valid so long as probable cause exists for any offense. *Huff*, 862 P.2d at 702.

Thus, the first occasion for petitioners to present written argument demonstrating that the "closely related offense doctrine" neither was the law nor clearly established law was in their Petition For Rehearing And Rehearing En Banc. Petitioners took immediate advantage of this opportunity, arguing they were entitled to qualified immunity under *Bingham v. City of Manhattan Beach*, 329 F.3d 723, 734 (9th Cir. 2003) ("Probable cause need only exist as to any offense that could be charged under the circumstances."), and that their entitlement also was supported by case law in Washington and other circuits. Pet. Reh'g En Banc at 1, 7-8. The Ninth Circuit denied the Petition For Rehearing And Rehearing En Banc, and petitioners asserted in this Court that the Ninth Circuit erred in applying the doctrine. The record establishes that the inapplicability of the "closely related offense doctrine" was part and parcel of petitioners' argument in the district court and, thus, was raised below.

Even if petitioners had not argued below that the "closely related offense doctrine", was inapplicable, it is still properly before this Court. The Ninth Circuit decided the issue. According to the Ninth Circuit: "[P]robable cause to arrest Alford

for other unrelated offenses, if present, does not render his arrest lawful or objectively reasonable for the purpose of allowing the officers to invoke the shield of qualified immunity." Pet. at 13a n.13. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("Respondents argue that this issue was not raised below. . . . It suffices for our purposes that the court below passed on the issue presented.").

2. Alford Has Confused The Fourth Amendment's Objective Reasonableness Test For Determining Probable Cause With The Reasonable Officer Test Under Qualified Immunity Analysis

Alford improperly mixes the issue of whether the "closely related offense doctrine" is constitutionally required by the Fourth Amendment with the question of whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted by the petitioners. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). *See* Resp't Br. at 1-2, 7-8. The constitutional question of whether probable cause is confined to facts and circumstances closely related to the offense cited by an officer at arrest is separate and distinct from the qualified immunity analysis of whether the rule was clearly established. At the time of Alford's arrest, case law in Washington and several circuits followed the objective reasonableness test of the Fourth

Amendment and held that an arrest was valid as long as probable cause existed for any crime.[11]

Given the divergence of authority, state and federal, on whether a court is constitutionally required to ignore the existence of probable cause for an offense unrelated to the offense cited at arrest, petitioners are entitled to qualified immunity. *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (when the state of the law is undeveloped and judges disagree on a constitutional question, law enforcement officers cannot be "expected to predict the future course of constitutional law").

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[11] *See Lee v. Ferraro*, 284 F.3d 1188, 1195 (11th Cir. 2002) (if probable cause exists, verbal announcement of the wrong offense does not vitiate an arrest); *United States v. Bookhardt*, 277 F.3d 558, 565 (D.C. Cir. 2002) (an arrest is valid, even if probable cause does not support arrest for the offense charged by the arresting officer if it exists for another offense); *Washington v. Huff*, 826 P.2d 698 (Wash. Ct. App.), *review denied*, 833 P.2d 387 (Wash. 1992); *People v. Rodriguez*, 53 Cal. App. 4th 1250, 1262, 62 Cal. Rptr. 2d 345 (1997); *Alaska v. Kendall*, 794 P.2d 114, 117 (Alaska 1990); *Golden v. Virginia*, 519 S.E.2d 378 (Va. Ct. App. 1999); *Florida v. Cote*, 547 So. 2d 993 (Fla. Dist. Ct. App. 1989); *People v. Kincy*, 435 N.E.2d 831 (Ill. App. Ct. 1982); *Tennessee v. Duer*, 616 S.W.2d 614 (Tenn. Crim. App. 1981). New Hampshire, Rhode Island, and Delaware statutes provide that an arrest will be upheld even if the officer charged the wrong offense. N.H. Rev. Stat. § 594:13; R.I. Gen. Laws 12-7-5; Del. Code. Ann. tit. 11, § 1905. The Uniform Arrest Act contains an analogous provision, section 7. *See* Sam B. Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 346 (1942).

C. Conclusion

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

RESPECTFULLY SUBMITTED,

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